BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEFINA RIVERA	)	
Claimant	)	
	)	
VS.	)	
	)	
T & T MANAGEMENT CO., INC.	)	
d/b/a MCDONALD'S	)	
Respondent	)	Docket No. 1,055,078
	)	
AND	)	
	)	
AMERISURE PARTNERS INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the July 19, 2011, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Conn Felix Sanchez of Kansas City, Kansas, appears for claimant. Brian J. Fowler of Kansas City, Missouri, appears for respondent.

Claimant alleges she suffered a personal injury by accident on January 18, 2011, when she fell at work. ALJ Sanders found the cause of claimant's fall was unexplained. She concluded claimant's injury arose out of and in the course of her employment with respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 19, 2011, preliminary hearing and exhibits, together with the pleadings contained in the administrative file.

ISSUES

While working for respondent, claimant became ill and requested to go to the restroom. When returning from the restroom, claimant fell in the lobby. She only remembers waking up and being surrounded by co-workers. Claimant does not know why she became unconscious and fell.

Claimant asserts that she suffered a personal injury by accident arising out of and in the course of her employment. Claimant requested medical treatment, but did not request temporary total disability benefits. Respondent disputes claimant's fall was work related and asserts it was the result of a preexisting personal medical condition – diabetes.

The issue on appeal is: Did claimant suffer a personal injury arising out of and in the course of her employment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant was injured on January 18, 2011, while working for respondent. Claimant's job duties were cooking and cleaning the grill. Cooking requires claimant to stand near and over the grill. She was required to bring boxes of meat from the freezer to the grill. On the date of the accident, claimant had been working 1½ years for respondent.

On January 18, 2011, claimant had been working at the grill for 1½ hours. Claimant cooks frozen meat and is very close to the grill when she cooks. She took a break and drank a soda. Claimant did not believe drinking the soda caused her to become nauseous. She testified the grill is very hot and she felt bad because of the heat. Claimant went to the restroom to see if she would feel better. She tried to throw up, but could not. Claimant then left the restroom to go back to work. The next thing claimant remembers is waking up on the floor with co-workers, managers and paramedics around her. During this time she was still on the clock.

Claimant does not know how long she was unconscious. Someone other than claimant called for an ambulance. She was transported by ambulance to St. Francis Health Center in Topeka, Kansas. At St. Francis claimant was given morphine for neck and back pain. She underwent a CT scan of the head and neck. Testing at St. Francis revealed that claimant's glucose level was 380.[1] The normal level is 120. Hospital records list three impressions, one of which was hyperglycemia. Claimant was prescribed pain medication and advised to stay off work on January 19, 2011. Claimant was discharged from St. Francis the same day she was admitted.

Claimant acknowledged that prior to the accident, she had problems with her blood sugar level. She testified that she had not ever fainted or fallen at her home.[2] Respondent introduced a report dated February 14, 2008, from Shawnee County Health Agency. The

---

[1] P.H. Trans., Resp. Ex. A.

[2] *Id.*, at 13.

report states that claimant complained of fainting the night before. The report indicates claimant underwent a random glucose test and her glucose level was 120. The following note was made by the individual who completed the report: "Probably related to eating habits(?) – hypoglycemia?"[3] Claimant acknowledged the fainting incident, but denied being informed of possibly having hypoglycemia by the doctor at Shawnee County Health Agency. Other than pain relievers for a headache, no medications were prescribed at that time. Records from Stormont-Vail Health Care Laboratory dated March 25, 2009, indicated claimant's glucose level was tested. Her glucose level was 117.[4]

Following the incident at work, claimant saw a physician at Shawnee County Health Agency on January 21, 2011. Her chief complaint was hyperglycemia. Claimant's glucose level, after fasting, was 263. On January 28, 2011, claimant had a follow-up visit at Shawnee County Health Agency with Dr. Paul W. McDonald. A report for that visit indicated claimant's glucose levels had dropped to 117-134.

The last report from Shawnee County Health Agency introduced at the preliminary hearing is dated March 15, 2011. Dr. McDonald's assessment was headache, neck pain, benign essential hypertension and Type 2 diabetes mellitus. Dr. McDonald prescribed Ibuprofen (800 mg.) for pain, Cyclobenzaprine for spasms and Lisinopril. Claimant testified she was also taking Metformin, an oral anti-diabetic medicine. The earliest mention of claimant being prescribed Metformin was in medical records from Shawnee County Health Agency on February 9, 2011.

Claimant testified that as a result of the accident, she has difficulty turning from her neck in between her shoulders and lower back. She experiences pain when lying down.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

---

[3] *Id.*, Resp. Ex. B at 2.

[4] *Id.*, Resp. Ex. B at 3.

[5] K.S.A. 2010 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

K.S.A. 2010 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.[8] Breaks benefit both the employer and employee.[9] In circumstances where the employee is taking a break in an area designated or permitted by the employer for such purposes, even if it is not on the employer's premises, there is also a degree of control sufficient to find the accident compensable.[10]

Larson's Workers' Compensation Law, Ch. 21 (2006) states:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the

---

[7] *Id.*, at 278.

[8] *See* Larson's Workers' Compensation Law § 13.05(4) (2006); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

[9] *Id.; Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005); *Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998); and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,244, 1997 WL 377961 (Kan. WCAB June 9, 1997).

[10] See Larson's Workers' Compensation Law § 21.02 (2006); *Riley v. Graphics Systems, Inc.*, No. 237,773, 1998 WL 921346 (Kan. WCAB Dec. 31, 1998).

> method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

This general rule clearly recognizes that ministering to personal comfort is conduct that is typically considered an incident of employment. Activities which are an incident of employment are considered to arise "out of" the employment.

In *Hensley*,[11] the Kansas Supreme Court categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. An injury that arises only from a personal condition of the employee, with no other factors as a cause, is not compensable.[12]

K.S.A. 2010 Supp. 44-508(d) in part states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2010 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

---

[11] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[12] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[13] K.S.A. 44-534a.

by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

ANALYSIS

There is little dispute the accident occurred while on respondent's premises and while claimant was on the clock. Claimant's accident occurred while she was returning from a bathroom break. Claimant went to the restroom because she was not feeling well. This falls within the purview of the personal comfort doctrine. This Board Member finds claimant's injury occurred in the course of her employment.

Under the Kansas Workers Compensation Act an injury does not "arise out of" employment where the disability is the result of the natural aging process or by the normal activities of day-to-day living.[15] An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[16] But an injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.[17]

Here, claimant fell at respondent's premises while performing normal work duties. Claimant testified she does not know what caused the fall. She earlier had worked near a very hot grill and felt ill. The condition of the floor is unknown. It is uncontroverted, however, that claimant fell and was injured while working for respondent on January 18, 2011.

Claimant previously fainted in February 2008. The next day claimant went to see a physician, who suspected hypoglycemia. Her glucose was normal. Claimant again had her glucose tested on March 25, 2009, and again it was normal. She was aware she had problems with her blood sugar level. Respondent argues the cause of claimant's January 2011 fall was a result of claimant's preexisting diabetes. A few days after the fall, claimant's glucose level was three times above the normal level.

The February 2008 fainting incident preceded the accident by almost three years. Medical records from that incident question whether the fainting spell was caused by bad eating habits and/or hypoglycemia. However, when tested, claimant's blood sugar level

---

[14] K.S.A. 2010 Supp. 44-555c(k).

[15] K.S.A. 2010 Supp. 44-508(e).

[16] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[17] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

was in the normal range. Prior to the accident, claimant received no medical treatment for hyperglycemia, hypoglycemia or diabetes. No physician testified as to causation. Claimant does not know what caused the fall.

There is some evidence to suggest claimant was overcome by heat. If so, the injury would be distinctly related to her job. Immediately prior to the fall, she worked over or near a hot grill for 1½ hours. She felt poorly because of the heat and went to the restroom.

This record presents a close question. In *Hensley*, the Kansas Supreme Court indicated risks fall into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. No substantial evidence was presented by respondent to prove that claimant's fall was caused by preexisting diabetes. Claimant indicated she felt badly because of the heat from the hot grill, but did not testify that was what caused her to faint.

Claimant's injury most clearly falls within the category of neutral risk as its cause is unexplained. Her fall was not attributable to a particular employment risk or a personal risk. This Board Member finds that claimant's injury is the result of an unexplained fall, which is a neutral risk injury. Thus, the ALJ's conclusion that claimant sustained an accidental injury arising out of and in the course of her employment with respondent should be and is hereby affirmed.

CONCLUSION

Claimant met her burden of proof that on January 18, 2011, she suffered a personal injury by accident arising out of and in the course of her employment.

WHEREFORE, the undersigned Board Member affirms the July 19, 2011, Preliminary Hearing Order entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of September, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge